

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re:)
)
EVERGREEN SECURITY, LTD.,)Case No. 6:01-bk-533-6B1
)Chapter 11
Debtor.)
_____)
)
R.W. CUTHILL, JR., Trustee)
)
Plaintiff,)
)
vs.)Adv. Pro. No. 02-149
)
JOHN WALYN, an individual,)
)
Defendant.)
_____)

MEMORANDUM OPINION

This matter came on Plaintiff, R.W. Cuthill, JR., Trustee's ("Trustee/Plaintiff") Complaint to Avoid and Recover Fraudulent Transfers Made by Evergreen Security Ltd. to John Walwyn.¹ A Final Evidentiary Hearing was held on June 21, 2004.² The following Findings of Fact and Conclusions of Law are made after reviewing the evidence.

FINDINGS OF FACT

1. Defendant John Walwyn ("Defendant") was an investment representative associated with Dean Witter Reynolds. Defendant was introduced to the Evergreen Security, LTD. ("Evergreen/ Debtor") investment program by Stanley Estrin of Southern Capital Securities Inc. in 1995.

¹ See doc. 1.

² See doc. 8.

2. Evergreen is an international business corporation that was formed in 1994 under the laws of the British Virgin Islands. From inception, Debtor has been externally managed and didn't have any employees. Debtor created a wholly owned trust entitled Evergreen Trust for the purpose of pooling investors' funds and purchasing various investments
3. Defendant, along with other lawyers, brokers, investment advisors and insurance agents ("Financial Professionals") sold certificates ("Certificates") on behalf of Evergreen. Evergreen voluntarily transferred remuneration ("Commissions") for the sale of each Certificate to the Financial Professionals. The sales of Certificates were Debtor's sole source of funds. Debtor was insolvent since inception.
4. Evergreen primarily used funds received from new investors to pay old investor's claims. Debtor's liability was approximately \$45 million in 1995; its liability increased to approximately \$214 million by 2000. Debtor's assets were approximately \$26 million in 1995; its assets decreased to less than \$3 million by 2000. Evergreen did not have any profits from which to pay liabilities and was only able to meet current liabilities by incurring new obligations during the 1995 – 2000 period. This investment strategy was a Ponzi scheme.
5. Evergreen received value from the Defendant in the form of additional sales of Certificates.
6. Defendant marketed himself as an investment representative with experience in offshore jurisdictions.
7. Defendant testified when determining Evergreen's legitimacy he relied on: (i) the Standard and Poor's rating of the Evergreen Fund issued on September 27, 1996;

- (ii) Nelson's World's Best Money Managers review of Atlantic Portfolio Analytics & Management, Inc.'s, a/k/a APAM, Inc. ("APAM") investment performance for periods ending December 31, 1995; (iii) West Side Advisor's marketing brochure ; (iv) International Services Inc. marketing brochure; and (v) APAM Disclosures for Performance Composites.
8. Although Defendant testified he had relied on the Standard & Poor's rating, he began selling Certificates prior to the Standard & Poor's rating being issued and continued to sell Certificates after the rating had been withdrawn.
 9. Defendant relied on verbal assurances from APAM regarding Evergreen's financial condition, but did not request or review any of Evergreen's financial records.
 10. Defendant did not know the costs and expenses associated with Certificates or the assets and liabilities of Evergreen.
 11. Defendant sold Certificates through Southern Capital Securities Inc. from March 1997 through August 2000. Defendant received Commissions totaling \$352,195.25 from Evergreen.
 12. Evergreen filed chapter 11 on January 23, 2001 ("Petition Date"). R.W. Cuthill, JR., Chapter 11 Trustee, was appointed on March 14, 2001.
 13. The Trustee filed this adversary proceeding against the Defendant for recovery of Commissions paid to Defendant pursuant to 11 U.S.C. §548 and Fla. Stat. §726.101 et. seq.

CONCLUSIONS OF LAW

1. The Trustee seeks to avoid and recover the fraudulent transfer of Commissions from Evergreen to Defendant pursuant to 11 U.S.C. §§544, 548, 550, and Florida Statutes §§726.105(a) and (b), 726.106(1), and 726.108.
2. Section 544(b) states, "...the trustee may avoid any transfer of an interest of the debtor in property...that is voidable in applicable law."³
3. Section 548 states,

The trustee may avoid any transfer of an interest of the debtor in property...that was made or incurred on or within one year⁴ before the date of the filing of the petition, if the debtor voluntarily or involuntarily – made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became...indebted; or received less than equivalent value in exchange for such transfer or obligation; and...was insolvent on the date that such transfer was made or such obligation was incurred.⁵
4. Section 550 states, "the trustee may recover, for the benefit of the estate, the property transferred...from...the initial transferee of such transfer..."⁶
5. Evergreen paid Defendant \$352,195.25 between March 1997 and August 2000. These payments constitute voluntary transfers of Evergreen's property made within four years of Petition Date.
6. Actual fraudulent intent is inferred from the fact that Evergreen was operating a Ponzi scheme.⁷
7. Constructive fraud has not been established as Defendant provided value to Evergreen in the form of investor funds.⁸

³ 11 U.S.C. § 544(b).

⁴ The provisions in Florida Statutes §§ 726.105(a) and (b), 726.106(1), and 726.108 are similar, except that the reach back period to recover avoidable transfers is extended to four years.

⁵ 11 U.S.C. § 548 (a)(1)(A)(B)(i) and (ii)(I).

⁶ 11 U.S.C. § 550(a)(1).

⁷ See In re World Vision Entertainment, Inc., 275 B.R. 641, 656 (Bankr. M.D. Fla. 2002).

8. Section 548(c)⁹ provides an affirmative defense to transferees upon a showing of good faith.
9. A Financial Professional, when receiving financial remuneration for the sale of an investment product, needs to investigate: (i) the financial, performance, and personnel background of the investment manager or the offering company; (ii) the associated risk factors and costs surrounding the investment strategy need to be disclosed and evaluated; (iii) the available investment ratings from qualified financial ratings services, before selling or recommending; and (iv) audited financial statements from the sponsor or issuer, as well as other literature provided by the company discussing its sales history and the background of key employees.¹⁰
10. Defendant failed to satisfy these guidelines and did not perform the due diligence required to demonstrate good faith. The defenses available to actual fraud pursuant to section 548(c)¹¹ are unavailable here due to lack of good faith.

Accordingly, Plaintiff's Complaint for avoidance and recovery of transfers pursuant to 11 U.S.C. §§ 544, 548, and 550 is due to be **GRANTED**.

Dated this 20th day of August, 2004.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

⁸ See In re Independent Clearing House Co., 77 B.R. 843, 859 (Bankr. D. Utah 1987).

⁹ 11 U.S.C. § 548(c) and Florida Statute § 726.109(1)

¹⁰ See R.W. Cuthill, JR., Trustee v. Harold James Kime and First American Life and Health Insurance Corporation, Case No. 01-533-6B1.

¹¹ 11 U.S.C. § 548(c) and Fla. Stat. § 726.109(1).